

**GUIDELINES FOR SUBPOENAS OF USDA EMPLOYEES
WHERE THE UNITED STATES IS NOT A PARTY TO THE LITIGATION¹**

USDA employees are prohibited from “appearing” in any proceeding arising out of an employee’s official duties with USDA or relating to their employment with USDA, unless authorization is received from the head of the employee’s agency and from the Office of General Counsel. While we think of an “appearance” as being a witness at a trial, deposition, or administrative hearing, the meaning is much broader. “Appearance” includes testimony or production of documents, but also includes an Affidavit, a deposition, an interrogatory (written question and answer) or other required written submission, and participating in court-related arbitration, mediation, or other dispute resolution.

If a USDA employee is served with a subpoena, s/he must act on it immediately because there are court deadlines which have to be met, and the State Office and OGC need time to review the subpoena and take appropriate action.

There are two types of subpoenas:

1. SUBPOENA: An order to appear and give testimony at a trial, hearing, or deposition.
2. SUBPOENA DUCES TECUM: An order to appear and give testimony at a trial, hearing, or deposition and to “bring with you” [“duces tecum”] documents or records.

A. When an employee is served with a subpoena or subpoena duces tecum, it is usually a good idea to contact the attorney issuing it by phone.

1. DO NOT DISCUSS THE CASE WITH THE ATTORNEY. Releasing any information about a USDA borrower or producer may be a violation of the Privacy Act and/or the Freedom of Information Act. Confine your discussion to learning what information it is the attorney is looking for.

¹IF YOU ARE SERVED WITH A SUBPOENA OR SUBPOENA DUCES TECUM THE SAME DAY YOU ARE ORDERED TO APPEAR, DO NOT TRY TO FOLLOW THESE GUIDELINES – CONTACT YOUR STATE OFFICE IMMEDIATELY!

2. Sometimes the attorney issuing a subpoena duces tecum actually wants only the documents. If you can determine from the attorney who issued the subpoena that s/he is requesting only documents and no testimony, send that attorney a letter confirming this using language similar to the following (send a copy to the State Office):

This is to confirm our conversation of _____, in which you stated that the subpoena you issued was for documents and/or records only and that attendance of _____ at the trial/hearing/deposition in order to give testimony is not required. The request for documents and/or records will be handled as a request under the Freedom of Information Act as required by 7 C.F.R. §§ 1.1, *et seq.*

3. If the attorney issuing the subpoena wants testimony, FAX him/her a copy of the regulations (7 CFR § 1.210, *et seq.*), attached as Exhibit 1 to this instruction. Also FAX a copy of the “TO WHOM IT MAY CONCERN” letter, attached as Exhibit 2 to this Instruction. Ask that the subpoena be withdrawn. If the attorney agrees, ask him or her to confirm in writing:

This is to confirm our conversation of _____, in which I stated that I will withdraw the subpoena I issued and that attendance of _____ at the trial/hearing/deposition in order to give testimony is not required.

Provide a copy of the confirmation letter to the State Office. If no confirmation is received, contact the State Office for assistance.

B. Request for Determination as to Authorization to Testify:

If the attorney does not respond or refuses to withdraw the subpoena, immediately complete Exhibit 3 (Directions Concerning Compliance with Subpoena by USDA Employee) and FAX it to the appropriate agency official for a determination as to authorization to testify. Along with Exhibit 3, fax a copy of the subpoena or other request you received and any written communication with the attorney regarding the matter.

C. Determination Whether or Not to Authorize Testimony:

1. When the agency authorizes testimony:

Pursuant to 7 C.F.R. § 1.214, a USDA employee subpoenaed to appear on behalf of a party other than the United States in a proceeding in which the United States is not a party may only appear if the appearance has been authorized by the head of his or her USDA agency,

with the concurrence of the General Counsel, based on a determination that the appearance is in the interests of USDA. 7 C.F.R 1.214 provides, in pertinent part:

(e)(1) In determining whether the employee's appearance is in the interest of USDA, authorizing officials are to consider the following:

- (i) what interest of USDA would be promoted by the employee's testimony;
- (ii) whether an appearance would result in an unnecessary interference with the duties of the USDA employee;
- (iii) whether an employee's testimony would result in the appearance of improperly favoring one litigant over another.

(2) The considerations listed in paragraph (e)(1) of this section are illustrative and not exhaustive.

If testimony is authorized by the agency head or his/her delegate, the agency official should sign Exhibit 3 (at Paragraph 16) and seek the concurrence of OGC by providing OGC with copies of all the documents regarding the subpoena. The authorization must be signed by the authorized Director, State Conservationist, or the "acting" official; this authority may not be delegated to others. OGC will either concur or reject the authorization in writing. It is expected that OGC will concur unless it knows of some legal ramifications which could adversely affect the government's interest.

If the employee is authorized to testify, s/he should review the witness preparation materials "Preparing to Testify" (Exhibit 5). If s/he has additional questions the employee should contact OGC.

2. When the agency denies authorization to testify:

If testimony is not authorized, the agency official should complete the "Denial of Authorization to Testify: memorandum (Exhibit 4). The denial must be signed by the authorized delegate, who is your agency's highest official in the state, i.e., State Director, State Executive Director, State Conservationist, or the "acting" official; this authority may not be delegated to others. The determination not to authorize testimony must be based on items numbered 11, 12 and 13 in Exhibit 3. A written statement should be included in Exhibit 4 for each of those items, even if the statement is that the determination was not based on that item. A copy should be FAXED immediately to the employee and to OGC with a request that action be taken to have the subpoena quashed. If necessary, OGC will refer the matter to the United States Attorney for representation.

If the employee hears from OGC or the United States Attorney's Office that the subpoena has been quashed or withdrawn, the employee need not attend to testify.

IF THE EMPLOYEE DOES NOT HEAR FROM OGC OR THE UNITED STATES ATTORNEY'S OFFICE AND THE TIME TO APPEAR ARRIVES, THE SUBPOENAED EMPLOYEE MUST ATTEND THE TRIAL, HEARING, OR DEPOSITION AT THE TIME AND PLACE GIVEN IN THE SUBPOENA. The subpoena is an order of the Court and cannot be taken lightly. Occasionally, the issuing attorney will give notice of a change of time and place, and the employee should appear at the new time and place. If the Subpoenaed employee fails to attend, s/he could be held of contempt of Court and government attorneys may not be able to assist.

7 C.F.R. § 1.214 provides direction to the employee of what to do if s/he must appear. The employee should provide a copy (take 5 copies) of the regulations at 7 C.F.R. § 1.210, *et seq.* ("Exhibit 1"), to the Court. Point out Sections 1.214(c) and 1.218, and respectfully decline to testify. Also, offer the Judge a copy of the "TO WHOM IT MAY CONCERN" letter (Exhibit 2) and the memo denying authorization to testify (Exhibit 4) (take 5 copies of each). If requested records cannot be provided under FOIA prior to the trial/hearing/deposition, also point out Section 1.215.

D. FOIA aspects of subpoenas:

Whether or not the subpoena has been quashed or withdrawn, the regulation requires that all subpoenas requesting documents or records are to be treated as FOIA requests for documents or records. See 7 C.F.R. § 1.215(a). Begin processing them as such on the date the subpoena is received and be sure to meet all FOIA deadlines.

E. Witness fees and travel expenses:

The regulations covering witness fees and expenses are found in 7 C.F.R. § 1.217.

An employee of USDA who attends a judicial or administrative proceeding on behalf of the United States is not entitled to receive witness fees for the attendance, but is entitled to receive travel expenses in accordance with the Agriculture Travel Regulations.

When a USDA employee is subpoenaed to appear on behalf of a party other than the United States, in order to testify or produce official documents on behalf of the United States, the subpoena will be accompanied by a check from the party issuing the subpoena, to cover witness

fees and travel fees. Since the USDA employee will be paid his/her salary by USDA, and may receive travel expenses from USDA in accordance with Agriculture Travel Regulations, any witness fees and travel fees received by the USDA employee should be remitted to the employee's USDA agency.

F. Other considerations:

1. If a subpoena is served on an employee to testify on personal matters – matters not arising out of an employee's official duties with USDA or relating to his/her employment with USDA – 7 C.F.R. §§ 1.210, *et seq.*, will have no effect.
2. If agency records are provided to an attorney who wishes to introduce them into evidence, the employee furnishing the records may sign an Affidavit "authenticating" the records, if she/he received authorization from the head of the agency or his/her delegate. A sample Affidavit is attached as Exhibit 6. If the Affidavit is requested by Court Order, the matter should be referred to OGC.

If an Affidavit, an appearance, or any other information is requested for any purpose other than to authenticate the records, the concurrence of OGC must be obtained as provided in Section C of this instruction.

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